FOR ARGUMENT

Supreme Court, U.S.
FILED
OCT 2[illegible]
JOSEPH F. SPANIOL, JR.
CLERK

No. 89-1330

IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

INTERNATIONAL ORGANIZATION OF MASTERS, MATES & PILOTS, ROBERT J. LOWEN, and F. ELWOOD KYSER,
Petitioners,

v.

TIMOTHY A. BROWN,
Respondent.

On Writ of Certiorari to the Court of Appeals for the Fourth Circuit

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PETITIONERS' REPLY BRIEF

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STATEMENT OF THE CASE

In the statement of facts set forth in his brief, respondent states that after the entry of the preliminary injunction in this case, the IOMM&P election was held and that "the incumbents ensured their election by stuffing the ballot box." Resp. Br. 4. This is a reference to a proceeding brought by the Department of Labor challenging the results of the 1988 election, which was recently heard and decided in the U.S. District Court for

the District of Maryland. The Court should disregard this appeal to prejudice for two reasons.

First, the claim is a false and blatant mischaracterization of those proceedings—there was no evidence presented at the trial and no finding by the District Court that either of the incumbents had anything whatsoever to do with the casting of fraudulent ballots or the lack of adequate safeguards.

The issues in that case involved balloting in a membership group of the union located in Panama. In September 1988, prior to the mailing of the ballots, written petitions signed by 180 members employed by the Panama Canal Commission were sent to the American Arbitration Association, which had been designated to serve as the Impartial Balloting Agency by the delegates to the August nominating convention and the International Ballot Committee, which had also been elected by the convention delegates, alerting them to the political unrest in Panama and the unreliability of the Panama mail system. A current postal strike was also cited. The petitioners asked that some alternate means to providing ballots to the Panamanian member, other than through the mails, be devised.

In response to the emerging situation, the American Arbitration Association arranged to forward the ballots to a bank in Panama rather than mailing them directly, where they could be picked up by members upon showing proper identification.

No contention was ever made in the litigation that the incumbents had anything to do with the events that occurred in Panama or with the decision to utilize the Panama Bank, and, in fact, no one ever contended that the incumbents even knew of these events until a challenge was raised after the conclusion of the balloting. Moreover, the court did not find that respondent would have won the election, although it found that the violations might

have affected the outcome of the election because Lowen's winning margin might have come from Panama, where *some* votes were affected by violations. (Tr. 21).

Second, this allegation has nothing to do with the issues in this case. Respondent apparently has little confidence in the validity of his arguments concerning the merits of these issues. The insertion of this inaccurate description is a patent attempt to cause the Court to decide this case not upon its merits, but upon the theory that the incumbents are bad people. This hardly has any relevance to the issue on which certiorari was granted.

ARGUMENT

IN ORDER TO BEST SERVE THE DUAL GOALS OF THE LABOR-MANAGEMENT REPORTING AND DISCLOSURE ACT ("LMRDA"), THE TEST OF COMPLIANCE WITH § 401(C) SHOULD BE WHETHER PETITIONERS HAVE FOLLOWED ALL REASONABLE RULES GOVERNING THE MAILING OF CAMPAIGN MATERIALS.

The issue in this case is how to properly interpret § 401(c) of the Labor-Management Reporting and Disclosure Act ("LMRDA"), 29 U.S.C. § 481(c). This section imposes a duty upon unions and officers to:

> comply with all *reasonable* requests of any candidate to distribute by mail or otherwise at the candidate's expense campaign literature in aid of such person's candidacy to all members in good standing of such labor organization. (emphasis added).

The parties' dispute involves whether the reasonableness of a request is determined by looking at the request alone, or by examining whether the request complies with reasonable union constitutional provisions governing election procedure. As respondent pointed out, Resp. Br. 18, the dispute is more than semantic, for it affects the entire balance of power among the union, union candidates, and the federal government.

This concern with the balance of power is a central and recurring theme of the LMRDA, because the statute, including § 401(c), was designed to achieve union democracy through autonomous self-government, subject to intrusions by the federal government only where necessary for the enforcement of minimum standards of conduct necessary to avoid abuse. Respondent's argument, however, focuses only on some of those considerations. It thus distorts the meaning and purpose of the statute.

A. The Words of the Statute Permit the Adoption of Reasonable Rules Regulating Distribution of Campaign Literature.

Much weight is placed by respondent and the amici who support him upon the fact that no express mention of union rules is made in the language of section 401(c) governing mailings of literature, and the verbal contrast between this subsection and the language of other sections which make reference to such rules. Resp. Br. 18. This supposed difference has little significance.[1] Because of the manner in which the LMRDA was enacted, its language is rife with ambiguities, both intentional and unintentional, particularly the compromise sections written largely upon the floor of Congress. Cox, Internal Affairs of Unions Under The Labor Reform Act of 1959, 58 Mich. L. Rev. 819, 833 (1960); Smith, The Labor-Management Reporting and Disclosure Act of 1959, 46 Virginia L. Rev. 195, 197-198 (1960). Therefore, undue emphasis cannot be placed upon the exact phraseology used in the statute.

The United States makes the argument that because of the manner in which the language contained in section

[1] Title I provides that: "Any provision of the constitution and bylaws of any labor organization which is inconsistent with the provisions of this section shall be of no force and effect." Section 101(b); 29 U.S.C. § 411(b). On this logic, one could argue with equal force that the absence of such language in section 401(c) is significant.

401(c) was adopted, the failure to insert an express proviso making mailings of literature subject to union rules indicates a legislative intent that such rules have no force in assessing the reasonableness of such requests. United States Br. 22-23. This argument reads far too much into the legislative history. It is true that this language was offered by Senator Javits as an amendment to the "Bill of Rights" proposed by Senator McClellan. However, the main point of the Javits amendment in the context of the pending debate was to confer the right to bring proceedings in federal court if discrimination with respect to mailing lists existed. See 105 Cong. Rec. 6021, 2 NLRB, Legislative History of the LMRDA (1960) at 1230 (hereinafter "Legislative History") (statement of Senator Kuchel). In fact, with the exception of that right, the language of the Javits amendment was quite similar to the language that already appeared in S. 1555 relating to the requirement of making campaign mailings on behalf of candidates and forbidding discrimination in the use of lists. Compare S. 1555, 86th Cong., 1st Sess. § 301(b), 1 Leg. Hist. 372 with 105 Cong. Rec. 6727-28, 2 Leg. Hist. 1240.

In contrast to the language of the Kuchel amendment, the language of the Javits amendment was never extensively debated. 105 Cong. Rec. 6727-28, 2 Leg. Hist. at 1240-1242. Thus, there is no evidence that Congress ever focused upon the question of how to determine what requests were reasonable, which, as petitioners have previously argued, is a necessary dilemma presented by the language itself.

Moreover, other factors in the legislative history support the construction of the statute urged by petitioners. It is apparent that one of the most significant concerns voiced in the Senate in connection with the campaign literature question was the possibility of discrimination in the use of lists. 105 Cong. Rec. 6021, 6727, 2 Leg. Hist. at 1230, 1240. As petitioners have argued, the ad-

vantage of a construction that permits regulation by union rules is that it eliminates the possibility for discrimination. Pet. Br. 21.

It would have been much simpler for respondent's argument if Congress had used the language "all requests," rather than "all reasonable requests." In the end, respondent's argument about the meaning of the statute cannot be squared with its language. This is demonstrated by the brief of the Association for Union Democracy, which frankly asks that the word reasonable be read out of the statute. Ass'n. Br. 20. Under this standard, there would be no requests that are not reasonable.

B. The Construction of Section 401(c) Urged by Respondent Is Not Supported by the Legislative Goals.

The essence of respondent's argument is that because incumbent officials enjoy advantages due to their incumbency, the statute must be interpreted in a way that overcomes this advantage. According to respondent and the amici who support his position, this is the only policy that may be given effect. There are two problems with this argument. First, interpreting the statute in this fashion does violence to its meaning. Second, it ignores the balance that was struck by Congress in enacting the statute.

First, it is readily apparent that the only interpretation that would serve the nonincumbents' interest in communication with the members would be one that placed no restriction at all upon the right to make mailings. That interpretation runs afoul of the statute's language. By limiting the right to make mailings to those that are reasonable, Congress itself rejected the interest in unlimited communication. As petitioners have previously argued, this case is about the process for determining the meaning of that limitation.

Second, the balance of competing interests has already been struck, and respondent is attempting to upset that

balance. LMRDA was a compromise, and it is clear that in fashioning the statute Congress sought to avoid unnecessary invasion of unions' power to govern themselves. Congress's desire to avoid unnecessary governmental intervention is a theme which runs throughout the legislative history of the LMRDA, and was intended to define the underlying structure of the provisions governing the union's conduct of elections. Contrary to respondent's suggestion, Resp. Br. at 16, these comments are not limited to the discussion in the original Kennedy-Ives bill regarding statutory recognition of codes of ethical behavior. They also appear in the Senate Report concerning S. 1555. S. Rep. No. 187, 86th Cong., 1st Sess., 1 Leg. Hist. 401, 403.

This concern was carried forward and expressed repeatedly throughout the debate. While much of that debate did concern the "Bill of Rights" provision, that debate immediately preceded the discussion of the Javits Amendment.[2] It is indeed a crabbed interpretation of the legislative history to argue that a Congress concerned in one breath with guarding against unnecessary inroads on union autonomy forsook that intention in the next breath.

Nor is this Court's recognition of the balance between competing objectives limited to a "fragment" in *United Steelworkers v. Sadlowski*, 457 U.S. 102 (1982). It has been identified in several holdings as one of the policies underlying the statute. *See* Pet. Br. 14. *See also* Beaird, Some Aspects of the LMRDA "Bill of Rights", 5 Georgia L. Rev. 661, 662 (1971); Griffin, The Landrum-Griffin Act: Twelve Years of Experience in Protecting Employee Rights, 5 Georgia L. Rev. 622 (1971).

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[2] There is little else available in the way of debate because there were few changes to the election provisions during the legislative process. Rezler, Union Elections, The Background of Title IV of LMRDA in Slovenko, Symposium on The LMRDA 491, 492.

The fact that respondent seeks to upset the balance achieved by LMRDA is exemplified by his arguments regarding the alleged advantage held by the incumbents through the use of union newsletters. Respondent asserts that this advantage must be given exclusive weight in construing the statute, because the fact of misuse of this advantage prior to creation of the LMRDA caused Congress to conclude that union candidates have an "absolute right to do membership mailings without a showing of discrimination." Resp. Br. 15. However, Congress created an independent remedy for such misuse. Section 401(g) prohibits union officers from using resources, including union newspapers, in order to promote their own candidacy. A remedy is provided for misuse of an incumbent's advantage, and where such misuse occurs the courts have imposed remedies. E.g., *Yablonski v. United Mine Workers*, 305 F. Supp. 868 (D.D.C. 1969). The determinant of whether this factor should result in government intervention in the union's conduct of an election is whether it has been abused.[3]

In the district court, respondent alleged in general terms that the IOMM&P incumbents controlled channels of communication. Respondent never submitted extrinsic evidence in support of these allegations.[4] Petitioners pointed out that respondent had been a delegate for years and had been making mailings to the membership through his own mailing lists since a date as early as 1977 (Memorandum in Opposition To Motion For Preliminary Injunction, Exhibits C through G). Because of the lack

[3] As Professor Cox stated, no legislation could completely nullify the advantages of incumbency. Cox, Internal Affairs of Labor Unions Under the Labor Reform Act of 1959, 58 Mich. L. Rev. 819, 844 (1960).

[4] Due to the District Court's decision not to admit any extrinsic evidence regarding the facts of the case, but to simply decide the case on the documents submitted at District Court, Petitioners have been precluded from presenting further evidence on this or other factual issues. JA 72-73.

of any support in the record or in fact for the notion that the incumbents abused their access to the membership through the union newspaper, respondent now seeks to argue that the Court may take judicial notice of this "fact" which must be considered in construing this statute. This is simply an attempt to rectify the omission of a fact from the proof, and should be rejected.

C. The Legislative Goals of the LMRDA Are Unduly Frustrated by the Ad Hoc Approach Suggested by Respondent.

Another defect in respondent's interpretation of section 401(c) is his assumption that a standardless reasonability interpretation will best promote the statutory goal of assuring a fair balance of power between incumbents and insurgents in elections. Such an interpretation simply shifts control of the decision-making regarding the reasonableness of a request away from the union majority and the insurgents, and places it in the hands of the incumbents, without limitation. If this ad hoc approach is used, the union officials could act without regard to any limits placed by the union majority. It also weakens the power of the courts to determine the reasonableness of a request, by not allowing the court to consider the realities of the electoral process of a union as they are expressed in the union's rules and regulations. Moreover, this approach would deteriorate the consistency of any court rulings, and thus would provide little guidance to future candidates as to the propriety of a particular mailing request. It would also lead to more disputes regarding compliance with section 401(c), thus taxing the financial and human resources of candidates, unions, and the federal government.

In contrast, if the standard of reasonableness is decided in advance by a union majority, many of the concerns raised by respondent would be eliminated. For example, rules setting standard procedure for election procedures and proceedings, including mailing requests, would limit

the discretion of union officials, and thus their ability to abuse this power. Moreover, it would be consistent with the larger goals of the LMRDA, as it would ensure the union's right to assist in determining what constitutes a reasonable request, by advising of particular needs and problems of that union's election procedure. While the union constitutional provisions reflect the majority and desire of the union, they also reflect a particularized knowledge of the needs and problems of the union members and the proper means for running an election.

Finally, construing the section to give effect to union majority rules does not give the union unlimited power over the operation of its elections; rather, it simply creates the presumption that the decision of the union officers in complying with the union regulations satisfies the requirements of section 401(c). Clearly, this presumption could be overcome by proof that the rule is unreasonable or applied in a discriminatory manner; petitioners have never argued that a rule must be enforced without regard to whether it is reasonable. Although respondent argues that this is an unfair burden of proof to place on insurgents, there is really little difference than if the focus was simply on the reasonableness of the request. As the statute requires respondent to bring an action to enforce compliance with § 401(c), a burden is imposed in either instance. As all the goals of the LMRDA will be better served by giving credence to the decisions of union majority, the ad hoc interpretation is not warranted.

Respondent and his amici argue that it is unbelievable that Congress would view favorably efforts to adopt rules limiting the ability of union officials to grant requests. United States Br. 15. This argument is an exercise in semantics. While it is all well and good to say that a union should exercise its power to grant all reasonable requests and should not discriminate, the argument fails to focus on how a union can perform these duties, or the ways in which a rule will better serve the interests of

all parties concerned by preventing manipulation and by furnishing advance notice of the conditions under which requests will be granted. It takes little imagination to envision the problems that result on a practical level from measuring the reasonableness of requests in all of their dimensions.

Recognizing this fact, respondent argues that a union is entitled to adopt procedural but not substantive rules. Resp. Br. 22-23. In fact, there is no reason why a provision that regulates timing of mailings stands on any unique footing in terms of the institutional interests of the union that call for regulation of campaign requests by a rule. Certainly, many other provisions regulating mailings could have an impact upon the ability of an insurgent to mount a campaign, such as the cost of the mailing list or the selection of the mailing service. There is no reason why a timing provision should be singled out for different treatment from other regulatory provisions, other than the fact that respondent seizes on it as particularly affecting the rights of insurgents.

Respondent's argument that his construction does not undermine union self-government, because a union may still adopt rules, is a hollow gesture. As Judge Phillips stated in his dissent from the in banc decision of the Fourth Circuit:

> If a union's general rule is not unfair or arbitrary in its general application, then a candidate's request to be exempted from its requirements is obviously "unreasonable." If this is not so, then there is little reason for unions to attempt to regulate election procedures by general rules.

JA 90. Allowing the existence of a rule that may not be enforced is worse than having no rule at all.

D. The District Court Erred in Finding the Petitioners Did Not Comply With Their Duty Under Section 401(c) in Following Their Constitutional Provisions Governing the Mailing of Campaign Materials.

Respondent argues that the union constitution does not have the meaning attributed to it by petitioners, and that therefore there is no rule to be enforced. Resp. Br. 30-32. This stage of this litigation is not the place to raise this contention. This case has been argued three times previously, and no mention was made of this contention. Respondent's attempt to raise it is contrary to settled procedures governing review by this Court.

A party who prevailed below may assert grounds not decided by the lower courts insupport of the judgment. However, where the ground was not presented below, the Court exercises its authority only in exceptional cases. *Heckler v. Campbell*, 461 U.S. 458, 468-469 n. 12 (1983); *Kentucky v. Stincer*, 482 U.S. 730, 747-748 n. 22 (1987).

This is not such a case. One of the problems is that the court refused to permit petitioners to adduce evidence concerning the rule's reasonableness. This Court should not undertake to define the parameters of the union election procedure when no factual record has been made precisely because this issue was never raised.

In any event, respondent's contention is incorrect. The prohibition against mailings prior to the close of nominations is inherent in the structure of the constitutional provisions governing election procedure.[5] It is clear that under the union's election procedure, the close of the convention is the event that engages the machinery for the campaign. It is also clear that prior to this time the elements deemed necessary by the union through its constitution to effectuate mailing rights do not exist. In order to comply with the constitutional requirements regarding election procedures, therefore, the International Ballot Committee is precluded from granting mailing requests until after the close of the nominations. These provisions make clear that petitioners were complying with the express provisions of the constitution in denying respondent's request to mail out campaign literature before the designated time.

[5] The union's election procedure is much like the procedure described in Summers, American Legislation for Union Democracy, 25 Modern L. Rev. 273, 291 (1962), where the campaign period follows selection of an election committee and nominations. Respondent's argument that the campaign period is too short ignores the ninety day balloting period, during which he may make repeated mailings.

There is no contention made that the incumbent officers have placed any novel interpretation upon these provisions, or that the procedure was any different from the 1988 elections than for previous elections. If petitioners' conduct could be construed as an interpretation of the union constitution, it is still proper because the decisions of the union officials in interpreting their rules and regulations are to be accorded deference. *See Local 334 v. United Ass'n of Journeymen*, 669 F.2d 129, 130 (3d Cir. 1982); *Vestal v. Hoffa*, 451 F.2d 706 (6th Cir. 1971), *cert. denied*, 406 U.S. 934 (1972).

Respondent makes light of the union's interest in preserving the organic whole of its election procedure. He asserts that petitioners could have effectuated the earlier mailings by sending out the campaign mailings themselves or by using the International Ballot Committee and International Ballot Agency from the previous election. Resp. Br. 38. However, this was not the procedure set forth in the union constitution, and such makeshifts give no consideration of other consequences that may result.

Respondent characterizes petitioners' argument as a contention that its rule can be struck down as unreasonable only if it is discriminatory. Certainly, whether or not a rule has discriminatory effect on union candidates

is an important fact in determining the rule's reasonableness. Here, the union provisions assure equality of treatment of union candidates and avoid any potential preferential treatment. This procedure applies to all candidates, including the union incumbents. Moreover, the rule imposes limits upon discretion of union officers in determining whether to grant requests.

There are additional union interests advanced by the operation of this union constitutional provision. First, and foremost, application of this rule assures that the voice of the union majority, as expressed in the union constitution, will be protected. By enforcing those rules chosen by the union majority, and consistently followed, the operation of the democratic process is preserved. The procedure avoids undue harassment of unions by ineligible candidates, while assuring candidates the right to be heard at or before the time that ballots are distributed and then again during the whole ninety day voting period.

Additionally, the union interest in neutrality in the operation of its election is assured by providing for the appointment of an independent balloting committee to govern the procedure for mailing out literature. While respondent makes suggestions of alternative methods for appointing such a committee two years before the election, such a selection does not take into account the difficulties in the operation of such a committee. The IOMMP is an international union whose members live around the country and whose jobs often require them to spend lengthy times away from their homes. The responsibilities of the balloting committee require members to give up several months of their time in order to meet and govern the conduct of the election. Imposing the heavy burden of this time and effort on the committee members, as well as the travel expense for the union was one that the union majority reasonably chose not to bear. The suggestion that the union have a permanent election committee in place goes beyond any possible requirement of reasonableness.

Finally, respondent suggests no alternatives to the union procedure, except no procedure at all. The problems arising from such an approach cause greater difficulties which obviously curtail the effectiveness of this method. As the union majority obviously concluded that the best method was the alternative set out in the union constitution, it is a reasonable rule.

The record in this case makes review of the full context of the union's election procedures difficult. Respondent argues, Resp. Br. 39, that petitioners are barred from complaining about this because their counsel stated at the beginning of the hearing in the district court on the motion for a temporary restraining order that "as I see it . . . the case can possibly be disposed of entirely on legal issues based on the affidavits that have been submitted." JA 65. However, counsel also stated that "insofar as there are factual conflicts, we would want the right to present evidence if they become important." JA 65. It is clear from a review of the transcript of the hearing that the only issue argued and considered at the hearing was the statutory construction of section 401(c), and whether compliance with the union constitutional procedure was sufficient to comply with that particular provision. It is also clear that the court found petitioners' proffer irrelevant and determined that no facts were essential to its decision. JA 73.

A better factual record would enhance the ultimate finding on the issue of whether the rule is reasonable. The courts have been required to ferret out crucial facts, such as the inaccuracy of respondent's initial implication that he needed preconvention mailings in order to be nominated, J.A. 8, under the pressure of expedited proceedings. Petitioners should be afforded the opportunity to develop any further facts necessary to prove the reasonableness of the rule.

CONCLUSION

For the reasons stated, it is respectfully prayed that the District Court and Court of Appeals decisions be reversed, and that this Court find that petitioner's denial of a noncomplying request to distribute literature was reasonable under 28 U.S.C. § 481(c). Alternatively, it is respectfully prayed that the Fourth Circuit decisions be reversed, and that this case be remanded for proceedings to present evidence on the issue of whether the rule is reasonable.

Respectfully submitted,

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